IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Criminal Appeal No.1219 SB of 2003

Date of Decision: October 16, 2007

Lakha Singh

...Appellant

VERSUS

State of Haryana

...Respondent

CORAM: HON'BLE MR.JUSTICE RANJIT SINGH

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

Present: Mr. K. S. Dhaliwal &
Mr. Baljinder Singh, Advocates,
for the appellants.

Mr. Yashwinder Singh, AAG, Haryana,
for the State.

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RANJIT SINGH, J. (ORAL)

Appellant Lakha Singh of Village Malikpur, Police Station Safidon, District Jind, has filed this appeal, impugning his conviction for an offence under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the Act") and sentence of 10 years awarded to him coupled with a fine of Rs.1 lac. He is also directed to undergo RI for two years

in case of default of payment of fine.

The case of the prosecution, in brief, is that on 3.1.2002, ASI Ganga Ram was present at Bus Stand, Malikpur, in connection with patrolling duty. At that time, he was accompanied by Head Constable Ramesh Chand, Constable Subhash Chand and another Constable Ramesh Kumar. One Ram Niwas had joined the police party at the Bus Stand. During this time, ASI Ganga Ram received a secret information that appellant, Lakha Singh was dealing in the sale of poppy husk and at present was in possession of two bags, which were kept in his residential Dera situated at Salwan Road, Malikpur. As per the information, the appellant could be apprehended with two bags of poppy husk in case the raid was conducted. Considering this information to be reliable and trustworthy, ASI Ganga Ram decided to raid the place. He also made an attempt to join an independent witness but none agreed as they showed their helplessness. Before proceeding further, ASI Ganga Ram reduced this secret information into writing and sent the same through Constable Ramesh Kumar to Deputy Superintendent of Police, Safidon. He alongwith other police officials went to the residential Dera of the appellant.

On reaching the place, the police party found one person present there, who was apprehended. On interrogation, he disclosed his identity as Lakha Singh (appellant). ASI Ganga Ram served a notice on him to the effect that he suspected presence of some contraband at the Dera and so he wanted to search the place. ASI Ganga Ram gave an option to the appellant in case he wished to be searched in the presence of a Gazetted Officer or a Magistrate. The

appellant, however, reposed confidence in ASI Ganga Ram, which was reduced into writing and signed by the appellant. On search of the Dera, two gunny bags were found containing poppy husk. A sample of 200 grams each was separated from the bags and the residue quantity, on weighment, was found to be 41 Kgs. in each bag. The samples and the bags were separately sealed and the seal bearing impression `GR' put thereon. Sample of the seal was also prepared and taken into police custody. Seal, after use, was handed over to Constable Ramesh Chand. A ruqa was sent through Constable Subhash Chand, on the basis of which FIR No.5 dated 3.1.2002 was registered under Section 15 of the Act. Investigating Officer prepared the site plan of the place from where the recovery was effected. He recorded the statements of various witnesses under Section 161 Cr.P.C. The parcels etc. were produced before SI Hans Raj, SHO, Police Station Safidon, who verified the factum of recovery and fixed his seal `HR' on the parcels. Case property was deposited in the Malkhana of Police Station and the appellant taken into custody. Samples were also sent to FSL for examination and on receipt of the report of the Chemical Examiner, the challan was presented, leading to trial of the appellant, his conviction and the sentence as afore-mentioned.

The case of the prosecution is supported by six witnesses. They all appeared before the Court to depose on the line as already noted while noticing the case of the prosecution. On completion of prosecution evidence, the evidence coming on record and the circumstances appearing in evidence against the appellant were put to him, who pleaded his false implication and stated that

nothing was recovered from him. After having been convicted and sentenced, the appellant is now in appeal before this Court.

Learned counsel appearing for the appellant has raised number of submissions to impugn the conviction of the appellant and the sentence awarded to him. He would first submit that the case is supported only by police witnesses who are interested witnesses. No independent witness is examined in this case. To challenge the submission of the prosecution that attempt was made to join independent witness but none agreed is countered by the counsel by saying that none of the police prosecution witnesses disclosed the name of any person who was asked to join but had not agreed. This, according to the counsel, would show that it is an after thought whereas no such attempt was ever made by the police officials. To further bring home his argument, the counsel would submit that as per the evidence, the police witnesses had reached the scene in the private jeep. It was, as per the counsel, very easy for the police to join driver of this private jeep as an independent witness to show the recovery of this contraband so as to substantiate its case. Further submission by the counsel is that no sufficient or reliable evidence has been led by the prosecution to show that the ***Kotha*** from where the recovery was made belonged to the appellant. Counsel has also made a strong grievance of the fact that the sample in this case was sent on 17.1.2002 i.e. after a gap of 14 days from the date of the incident. It is pointed out from Ex.PL, which is FSL report, that the forwarding letter prepared by the DSP is stated to be dated 9.;1.2002 whereas the sample concededly was received at the FSL on 17.1.2002. This fact is further co-related by the counsel with his

submission that seal in this case was not handed over to any independent witness after being used and as such, the possibility of the sample or contraband having been tampered with can not be ruled out. In addition, the learned counsel has also made a statement that prosecution has not been able to establish conscious possession of the appellant over the contraband, even if it is proved to have been recovered from a ***Kotha***. Accordingly, he has prayed for setting-aside the conviction and award of sentence to the appellant.

On the other hand, learned counsel appearing for the State, by referring to the evidence led by the prosecution, would submit that each and every witness brought out before the Court that efforts were made to join independent witness but none agreed. He would further submit that mere non-joining of an independent witness can not lead to any advantage to the appellant but what he has to show in order to succeed is that the police witnesses are not worthy of reliance and that no implicit reliance can be placed on their respective testimonies. In this regard, the State counsel has made reference to ***Bakshish Singh Vs. State of Punjab***, 2004 (3) RCR (Criminal) 64. Otherwise, learned counsel concedes that independent witness in this case was not joined. Learned State counsel also points out that perusal of F.S.L. Report, Ex.PL, would show that the seal on the sample sent for examination was found to be intact. He accordingly submits that mere delay in sending the sample would not dent the prosecution story in the core, which otherwise receives support from the testimony of various police witnesses. He would also refer to the fact that sample in this case was taken out on

17.1.2002 and it had reached in the F.S.L. on the same day, which is clear from the FSL report, Ex.PL.

The case of the prosecution is supported by mainly PW5 HC Ramesh Chand and PW6 Ganga Ram ASI. Ganga Ram, ASI, who had received, the secret information about the contraband lying at the Dera of the appellant. He had so deposed before the Court. His evidence would show that secret information was also to the effect that in case a raid is immediately conducted, then the contraband could be recovered. A fact of significance, which may need a notice here is that upon receipt of this secret information, PW6 concededly reduced the same into writing. It is also on record that he sent this secret information to his superior i.e. D.S.P., Safidon. This would lend assurance to his evidence about the receipt of secret information, which has made him to conduct this raid, leading to recovery of contraband. Something in regard to receipt of this secret information could have been said if the provisions of Section 42 of the Act had not been complied with. Reducing this secret information into writing and then sending it to his superior officers would lend assurance to his evidence as an independent fact and may tend to show that this information perhaps was received by him, which prompted him to constitute a raiding party and for conducting the raid. PW6 has further deposed that on reaching the Dera, he found the appellant present there and his identity was revealed on interrogation. PW6 has then given an option to the appellant in case he wished to be searched in the presence of a Gazetted Officer or a Magistrate. It is noticeable that it was not a case of personal search where the provisions of Section 50 o the Act

were attracted. Still, this option was given by PW6 to the appellant. The fact that this option was given to the appellant is not in dispute as the appellant had thumb marked the writing Ex.PE/1 made in this regard, which is witnessed by Head Constable Ramesh Chand and UGC Ram Niwas. It is thereafter that the place, which is ***Kotha,*** was searched, leading to recovery of two bags of poppy husk. The bags were statedly lying in the south-west corner of the room. It is on record that weights and scales were lying in the house of the appellant, which were utilised for separating the sample. The weighment of the contraband was done by spring balance. The contraband, after recovery, was sealed and so too the samples. The seal put on the samples was found intact till it reached FSL, as can be seen from the report Ex.PL. The evidence of PW6 would further show that all the items, which were recovered, were attested by Ramesh Chand and UGC Ram Niwas. Thereafter, ruqa, Ex.PA, was sent to the Police Station through Constable Subhash Chand.

Another fact of significance which require notice is that PW6 had then served a notice, Ex.PH to the appellant, asking him to summon any person or relative while he was to be interrogated or during the investigation. The appellant had submitted a reply, Ex.PH/1, saying that he did not wish to summon any one. Notice of arrest, Ex.PG, was also served to the appellant. Again, he gave in writing, Ex.PG/1 that he did not wish to summon any person and that he had already sent information to his brother. The contraband, after recovery, was produced before PW4 Hans Raj, Sub Inspector, Police Station City Jind. He has also given clear evidence in regard to the fact that ASI Ganga Ram had produced before him the appellant and

PWs HC Ramesh Chand and Ram Niwas, UGC alongwith two bags containing poppy husk, weighing 40 kgs. each alongwith samples duly sealed. PW4 had verified the factum of recovery and put his seal `HR' on each parcel. Supplementary statements of Constable Ramesh Chand and Ram Niwas, UGC, were also recorded by PW4. To similar effect is the evidence given by PW5 Constable Ramesh Chand (now ASI). He has lent full support to the evidence given by PW6 ASI Ganga Ram. Detailed cross-examination of these witnesses was conducted on behalf of the appellant. Nothing substantial is pointed out before me, which will go to dent their version in any manner. Both the witnesses i.e. PW5 and PW6 have deposed that they made an attempt to join somebody as an independent witness but none agreed. This aspect of the prosecution case would appear worthy of credence when viewed in the light of the fact that an option in writing was given to the appellant himself for calling any person to join at the time of recovery and investigation. This fact is not stated orally but is substantiated by the written record, which is exhibited in evidence. Nothing is stated to counter this by the defence. It would give enough indication that efforts were made by the police party to join some independent witness but none agreed or was available. The fact that the appellant was given option to summon some independent person during the recovery or investigation would further show the appellant to be the owner of the place from where the recovery is effected. At that stage, it was still open before the appellant to call any independent person to show that the house or the place from where the recovery is being effected does not belong to him.

The submission made by the learned counsel for the appellant that prosecution did not prove the appellant to be the owner of this ***kotha*** also is not borne out from the record. The evidence would rather point out to the effect that raid was conducted at ***kotha*** where the appellant was found present and taken in custody. He was given an option in writing to summon any one during the course of investigation but he chose not to utilise the option given to him. The fact that the ***kotha*** and the contraband belonged to the appellant can further be made out from the examination of the appellant. It can not be said that the fact of recovery etc. and the contraband being in conscious possession of the appellant was not put to him. In fact, one of the question specifically addressed to the appellant is that thereafter the Dera was raided and the appellant was found present at ***his*** Dera. The relevant portions of the evidence as put to the appellant are "**that thereafter your Dera was raided and you were found present in your Dera."** From this, it is very clear that the appellant was specifically addressed a question that the Dera, which was raided was his Dera and that he was arrested from his Dera. Under these circumstances, to say that the aspect of conscious possession of recovery or ***kotha*** being not belonging to the appellant as urged, can not be accepted. This also stand contrary to the submissions made by learned counsel for the appellant that he was not arrested from the ***kotha*** but from some place outside. There is no evidence led or other material pointed out before me, which would show that the appellant was arrested from some other place and not from the ***kotha*** or Dera. The appellant otherwise has not

alleged anything against the police witnesses for which they would have any interest to falsely implicate him. In Balwinder Singh (supra) relied upon by the counsel for the State, it is observed that merely because no independent witness is joined in this case would not result in doubting the recovery when it is supported by two other officials who are consistent in their statements so far as conscious possession over the contraband of the appellant is concerned. In this very case, it is also held by this Court that delay of 14 days in sending the sample to FSL would not dent the prosecution case. It is observed that delay is very common in such cases and in order to succeed, the accused or the appellant has to show that some prejudice is caused to him in this regard by late sending of samples.

The counsel for the appellant, as last resort, says that link evidence in this case is totally missing, which will create doubt in the recovery and sending of the sample. As per the counsel, it may also lead to an inference that the samples were tampered with. This argument is advanced on the basis of Ex.PL, which is the FSL report. It is pointed out that forwarding memo 184-S dated 9.1.2007 regarding two sealed samples is in connection with this FIR. From this, the learned counsel would contend that the forwarding letter and withdrawal of the samples was on 9.1.2002 whereas these had reached the FSL on 17.1.2002. Learned counsel for the appellant, in my view, is reading this aspect in isolation and not in totality of the note. It would, as such, be appropriate to notice the entire note endorsed on Ex.PL in this regard:-

> "Your forwarding memo No.184-S dated 9.1.2002 regarding two sealed parcel (s) in connection with FIR

No.05 dated 3.1.02 under Section 15/61/85 NDPS Act, Police Station Safidon stated by you to have been despatched vide R.C. No.51 dated 17.1.02 through Const.Naresh Kumar-784 received in this division on 17.1.2002."

It is clear from the above that though the forwarding memo is dated 9.1.2002 but these samples were statedly despatched vide RC No.51 dated 17.1.2002 through Constable Naresh Kumar-784 and were accordingly received at the FSL on the same day i.e. 17.1.2002. The assertion made by the counsel for the appellant, as such, would not be made out from the exhibit as highlighted by him. Otherwise, the affidavits of PW2 and PW3 would show that exhibit samples were drawn on 17.1.2002 and were deposited in the FSL on the same day. No sample was withdrawn from the Malkhana on 9.1.2002. Apparently, only a forwarding letter was prepared and perhaps signed but samples were despatched on 17.1.2002. There is, thus, no missing evidence in chain as urged by learned counsel for the appellant.

In view of the discussion above, I do not find any merit in the appeal. The same is dismissed. The appellant is on bail. He would surrender before the Chief Judicial Magistrate, Jind, to undergo the remaining portion of sentence awarded to him.

October 16,2007 **(RANJIT SINGH)**
khurmi **JUDGE**